

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION

4 CENTOCOR, INC., ET AL.,) (
5) (CIVIL DOCKET NO.
6) (2:07-CV-139-TJW
7 VS.) (MARSHALL, TEXAS
8) (
9) (JUNE 12, 2009
10 ABBOTT LABORATORIES) (9:20 A.M.

11

12 PRE-TRIAL HEARING
13 BEFORE THE HONORABLE JUDGE CHAD EVERINGHAM
14 UNITED STATES MAGISTRATE JUDGE
15

16 APPEARANCES:

17

18 FOR THE PLAINTIFF: (See Attorney Sign-In Sheet)

19

20 FOR THE DEFENDANT: (See Attorney Sign-In Sheet)

21

22 COURT REPORTER: MS. SHELLY HOLMES, CSR
23 Deputy Official Court Reporter
2593 Myrtle Road
24 Diana, Texas 75640
(903) 663-5082

25 (Proceedings recorded by mechanical stenography,

transcript produced on a CAT system.)

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1 COURT SECURITY OFFICER: All rise.

2 THE COURT: Be seated. Morning.

3 We've got a hearing on the pre-admission of
4 exhibits and deposition designations in 2:07-CV-139.
5 It's Centocor against Abbott Laboratories.

6 What says the plaintiff?

7 MR. SAYLES: May is please the Court, Dick
8 Sayles for the plaintiffs. We're ready to proceed.

9 THE COURT: Okay. And for the defendant?

10 MR. BECK: Your Honor, David Beck and Amy
11 Wigmore for Abbott. We're ready to proceed.

12 THE COURT: Okay. All right. I received in
13 chambers yesterday afternoon a letter outlining, I
14 guess, the larger categories of disputed exhibits.

15 Tell me -- tell me what your agreements are
16 at this point and what y'all need me to rule on.

17 Mr. Sayles, do you want to --

18 MR. SAYLES: Well, Your Honor, I'd like to
19 introduce our team. I do have some that I'm going to
20 address, but the agreements have been kept up by
21 Ms. Verrechio, I believe, or Matt Pearson.

22 THE COURT: Okay.

23 MR. SAYLES: So we can tell you what those
24 are.

25 THE COURT: Okay.

1 MR. SAYLES: Steve Maslowski.

2 THE COURT: Okay.

3 MR. MASLOWSKI: For Centocor. Your Honor,
4 we've removed most of our objections to defendant's
5 exhibits. So in terms of addressing categories, I'll
6 address both parties' exhibits. There's nothing to deal
7 with in that sense. We have a large number of exhibits
8 that are objected to. We've categorized them ourselves.
9 I'm not sure, the letter you're referencing, is that
10 from defendant's counsel?

11 THE COURT: It is.

12 MR. MASLOWSKI: Okay. I'm not sure we've
13 seen a copy of that letter, so I'm not sure the
14 categorizations that they've given to the documents.

15 THE COURT: Well, all it says is how
16 unreasonable you were being.

17 MR. MASLOWSKI: That's to be expected, Your
18 Honor. So like I said, we --

19 THE COURT: It didn't say that.

20 MR. MASLOWSKI: We have broken down our
21 exhibits to which they've objected to into different
22 categories that we're, of course, happy to talk about.
23 We've eliminated some objections this morning.

24 THE COURT: Okay. Why don't we do it this
25 way, I'd like to proceed through the -- get the

1 plaintiff's exhibits pre-admitted, and then I'll go to
2 the defendant's exhibits, get those pre-admitted to the
3 extent -- to the extent I can, then we'll move on to
4 deposition designations in the same order.

5 So why don't -- from the plaintiff's
6 standpoint, why don't you tell me what you want to
7 pre-admit to which there's no objection being made?

8 MR. MASLOWSKI: We have a pretty lengthy
9 list, Your Honor. Would you like us to read it into the
10 record?

11 THE COURT: Well, I don't need you to read
12 it in the record if it's all on the same list, and you
13 can just refer me -- refer it to me, and I'll just admit
14 those that are on the list.

15 MS. VERRECCHIO: There -- Your Honor, there
16 were additions added to the list this morning from the
17 list that you received last night.

18 THE COURT: Okay.

19 MS. VERRECCHIO: I can tell you what the
20 additions are to the list from last night, and that
21 would be complete for our pre-admissions.

22 THE COURT: Okay. Well, for purposes of the
23 record, the list that I've got is entitled Plaintiff's
24 Trial Exhibit List With Defendant's Objections. Is
25 that --

1 MS. VERRECCHIO: No.

2 MR. MASLOWSKI: You should have received two
3 lists. There was one with objections and one without.
4 We will -- can we hand this up?

5 MR. STRACHAN: Your Honor, if I may --

6 THE COURT: Yes.

7 MR. STRACHAN: -- I've got a clean copy.

8 MS. WIGMORE: May we have a copy? We
9 haven't seen that.

10 MR. STRACHAN: It's what we sent last night.
11 Did we send that to you last night?

12 MS. WIGMORE: I did not receive it if it was
13 sent.

14 MR. STRACHAN: Your Honor, there's
15 plaintiff's list of trial exhibits for pre-admission to
16 which there's no objection, and that's what she's
17 referring to.

18 THE COURT: Okay.

19 MS. VERRECCHIO: And then there's a couple
20 of additions that we worked out this morning.

21 THE COURT: Well, have -- has the defendant
22 been provided with --

23 MS. WIGMORE: We have not, Your Honor. We
24 would like to see that, and, actually, are there new
25 exhibits on that list that were not --

1 THE COURT: Okay. Tell you what, I'm going
2 to recess until 9:30, and y'all talk about what is not
3 objected to and make sure that you've got your lists in
4 order, and I'll see you in 10 minutes. We're in recess.

5 COURT SECURITY OFFICER: All rise.

6 (Recess.)

7 COURT SECURITY OFFICER: All rise.

8 THE COURT: Please be seated. Mr. Sayles --

9 MR. SAYLES: Yes, sir.

10 THE COURT: -- which exhibits are y'all
11 offering to which there have been no objection made?

12 MR. SAYLES: Your Honor, I have a list here
13 of objection -- of exhibits to which there is no
14 objection that consists of 31 pages, and I can provide
15 it to the Court or read them into the record, whichever
16 is preferable.

17 THE COURT: Just provide it to the Court.
18 Has counsel for the defendant had the opportunity to
19 review it?

20 MS. WIGMORE: Your Honor, we're making our
21 way through. Thus far, it appears to be accurate.
22 We've discussed with the other side that to the extent
23 there are any discrepancies, that we would talk about
24 them afterwards.

25 The one question that I do have is their

1 number of physical exhibits and demonstratives toward
2 the end which are not agreed upon for pre-admission.

3 MR. MASLOWSKI: Right. Here, we can take
4 this off. Here.

5 THE COURT: What number do those start with?

6 MS. WIGMORE: So they begin --

7 MR. MASLOWSKI: 825.

8 MS. WIGMORE: Yeah, and, actually, starting
9 with 805.

10 MR. MASLOWSKI: No, it's 825.

11 MS. WIGMORE: Well, it's not demonstratives,
12 but 805, I just want to make sure that that matches up
13 with the list that we had. We had objected to -- oh,
14 no, we didn't. Never mind.

15 Yeah, it's starting with 812, and with
16 respect to demonstratives and physical exhibits, we have
17 no objection to working with our -- the other side to --
18 to share and perhaps agree in advance, but we have not
19 done that, so we would object to any pre-admission of
20 demonstratives.

21 THE COURT: Okay. Well, all right. Subject
22 to your having the opportunity to complete your review
23 of plaintiff's list of trial exhibits for pre-admission
24 to which there's no objection, the Court will admit PX 1
25 through PX 805 contained on that list, and y'all meet

1 and confer and let me know of any agreements by, you
2 know, by -- does close of business Monday give you
3 enough time to -- to look at the demonstratives and the
4 physical exhibits that are on there, or do you need
5 until Tuesday?

6 MS. WIGMORE: Well, we had a separate
7 arrangement with respect to demonstratives, so we
8 don't -- we don't actually have all of these
9 demonstrative physical exhibits. We would object to the
10 concept of pre-admitting demonstratives since many of
11 them shouldn't go back to the jury in our view. They're
12 simply just --

13 THE COURT: Well, that's -- I mean, I agree.
14 I just didn't know -- well, I don't know what your
15 agreement is with respect to the demonstratives. I
16 would not ordinarily pre-admit as substantive evidence
17 demonstratives or, you know, physical models or things
18 like that.

19 MS. WIGMORE: And that is our position. So
20 we think those should not be on the list at all, but by
21 the close of business Monday, we can certainly confirm
22 the accuracy of the list, probably even before that.

23 THE COURT: Okay. Well, then PX 1 through
24 PX 805 are pre-admitted subject to my statements
25 concerning your ability to review the list for its

1 accuracy.

2 MR. MASLOWSKI: Your Honor, just to clarify,
3 I believe our list goes up to 853. Does the copy you
4 have go up to 853? We cut out the demonstratives, and
5 then, actually, there are a few exhibits that followed
6 the ones that we cut out.

7 THE COURT: Well, my list does go to 853,
8 and I had assumed that the demonstratives were all at
9 the end. So which -- where do the demonstratives stop?

10 MR. MASLOWSKI: The demonstratives stop at
11 813, and the exhibits start back up at 841.

12 THE COURT: Well, then, 841 through 853,
13 then, are also pre-admitted.

14 MR. MASLOWSKI: Thank you.

15 THE COURT: All right.

16 MR. SAYLES: May it please the Court.

17 THE COURT: Mr. Sayles.

18 MR. SAYLES: I have two categories of
19 documents to which there are objections. It covers
20 about 60 exhibits, but there are really only two
21 categories, and if -- if the Court please and if it's
22 the time that the Court wishes to do that, I'm ready to
23 address those specific exhibits and offer them into
24 evidence.

25 THE COURT: I am, too. So tell me what the

1 categories are and which exhibits.

2 MR. SAYLES: All right. The first one would
3 be Exhibit 328, which is from a publication called
4 Science Magazine. I know it's in your book there, but I
5 have it for the Court so you don't have to dig through
6 it, if I may approach.

7 THE COURT: Please.

8 MR. SAYLES: This document is representative
9 of the first category, which would also include
10 Exhibit 408 and 409. We offer these in evidence. This
11 document, as you can see from the cover and the page of
12 the contents, is a publication from July of 1991.

13 The important part is the part on the last
14 page which is of the Cambridge Antibody Technology
15 Limited Company, and what this is, it is an
16 advertisement in this scientific journal that is saying
17 to the public that their technology is available for
18 licensing.

19 One of the defensive positions taken in this
20 matter is that there are only a handful of people in the
21 world that could make human antibodies back during the
22 time frame in question in this case.

23 We offer this to show that not necessarily
24 for the truth of the claims made by CAT Technology here
25 but to show that this was known and available to people

1 involved in this scientific field at the time of this
2 publication and was publicly available. They have not
3 raised a relevance objection. They claim that it's
4 prejudicial. They claim that it is hearsay.

5 We submit that it meets the -- the condition
6 of 803.17 as a list or directory. We also submit that
7 it's not offered for the truth and so the hearsay rule
8 doesn't apply.

9 THE COURT: And what purpose are you
10 offering it for if not for the truth?

11 MR. SAYLES: We are offering to show that
12 the technology was known and available in the industry,
13 two scientists who were involved in genetic engineering
14 and in building and replicating human antibodies.

15 THE COURT: And how is that not for the
16 truth of what's stated in this article?

17 MR. SAYLES: Well, their technology might or
18 might not work. That would be the truth. But that it
19 is being advertised as being available for licensing is
20 the point. And they do cite in the footnote in those
21 references the references to their technology which is
22 contained in other documents that will be in evidence.
23 So that's -- that's the purpose of it.

24 Now -- and I will add too, Judge, no one in
25 this case claims that the Cambridge Antibody Technology

1 did not work actually. But we're not offering this to
2 show that it did. We're offering to show that it was
3 available and people who were knowledgeable in the field
4 would know that.

5 MS. WIGMORE: Your Honor, may I respond?

6 THE COURT: Yes.

7 MS. WIGMORE: This is classic hearsay, and
8 it is being offered for the truth. A key issue in this
9 case is whether human antibodies were enabled as of this
10 time period.

11 This is third-party statements. They
12 haven't taken any discovery from CAT, which they could
13 have. And a key issue in the case is how long it took
14 from this time to when an actual human antibody meeting
15 the scope of their claims was achieved. Whether they
16 say it's being offered for the truth or not, that is the
17 purpose, and it will confuse the jury even if it were
18 offered for some limited purpose.

19 It's not a scientific article. It's an
20 advertisement. You know, you need to cross examine the
21 people who wrote this to see what was true and what was
22 untrue, and they haven't done that.

23 MR. SAYLES: Judge, if I may respond to
24 that, the Cambridge Antibody Technology that has been
25 discussed by both technical experts, and, in fact, it

1 was the Cambridge Antibody Technology group that
2 actually made the accused product, Humira, here. So
3 that all goes to the weight of this evidence.

4 MS. WIGMORE: We have no objection to the
5 discussion of the technology. What we have an objection
6 to is an advertisement that's from a third party who is
7 not in court to testify about it.

8 THE COURT: Well, I tell you what I'm going
9 to do, Mr. Sayles, I'm not going to pre-admit these.
10 I'm not excluding them, but I'm just not going to
11 pre-admit them as exhibits.

12 MR. SAYLES: All right.

13 THE COURT: When the time comes to use them
14 with your technical expert or whomever you wish to use
15 them with, you can lay a foundation at that time for
16 their use that demonstrates that you're not offering
17 them for the truth.

18 You know, as I see it, based on the
19 argument, what you're offering it for is to show that
20 the technology was there and it was known, and that
21 seems to me to be offered for the truth. So that's why
22 I'm not -- not pre-admitting it. There may be a
23 different purpose for which you can offer it at the
24 time.

25 MR. SAYLES: All right. And, Your Honor, in

1 the effort for expediency, 408 and 409 are similar
2 advertisements from the NIH Magazine and from Nature
3 Magazine involving technology in this field from
4 Novagen, and I would assume naturally the Court is
5 handling those in the same way.

6 THE COURT: I'll carry -- my same ruling.

7 MR. SAYLES: All right. The next category
8 of documents that -- that I wish to discuss are
9 attachments to our damage expert witness' report,
10 Dr. Richard Gering, and I offer in evidence Exhibits
11 493, 496 through 554 in evidence.

12 These are all of a similar nature. These
13 are summaries of documents that were reviewed by
14 Dr. Gering. And let me say that the testimony in this
15 case is that he reviewed approximately three million
16 pages of documents, so the documents are quite
17 voluminous. They are both Abbott documents, and they
18 are Centocor documents, and they have all been produced
19 in this case and available to both sides.

20 These various documents, and I'll show you a
21 couple of examples in a moment, are a summary of Abbott
22 sales in the U.S., Abbott sells ex-U.S, a reasonable
23 royalty base calculation, lost profits by indication,
24 and by the way, I want to mention in this case, these
25 drugs address five different disease processes, so there

1 are five different indications, and the -- the approvals
2 and uses of these drugs for these indications are on
3 various dates, and so, consequently, it makes the volume
4 of data high to analyze each of these separately, and it
5 makes it very complex.

6 In addition, these documents show a summary
7 of Centocor's Remicade sales. That's the plaintiff's
8 drug. It's shows a summary of Abbott's Humira sales,
9 the accused product. There are documents that show
10 calculations that are adjustments to the market assuming
11 that there's no Humira on the market, and that's by
12 indication. There are calculations of the source of
13 patients, and I know that sounds a little unusual, but
14 source of patients is a concept that's very involved
15 here.

16 For each indication, one must ask if this
17 patient has ever been on any of the competing drugs,
18 they're called Bionaive, or if they are on, let's say,
19 Remicade as a result of a Humira failure because some
20 patients respond to each of these drugs better than
21 others. All of that is analyzed and summarized in these
22 documents.

23 And there is a calculation of the Remicade
24 profit and loss. There's a calculation of the Humira
25 profit and loss. There's a calculation of -- of each of

1 these items and in detail, and I want to show you just a
2 couple of examples, and then I'll give you the legal
3 basis upon which we believe these should be admitted.

4 The first one is 493, which I'm putting up,
5 and I'll see if I can -- it's a summary of the damages
6 of reasonable royalty and lost profits. The next one is
7 Exhibit 497, and I've marked on this in red pen and
8 highlighter, this is to show the Court in just
9 calculating the royalty base calculation, there are four
10 years involved. There are five indications involved.
11 There is the United States, and there is international,
12 and so a summary of these voluminous documents would be
13 helpful.

14 The next example is Exhibit 500, which is a
15 summary of profits by indications, and as you can see,
16 it goes across the relevant years from 2006 to 2009 and
17 goes down for the five indications.

18 And then here is an example in Exhibit 502,
19 and 503 is second page of 502, taking one indication,
20 rheumatoid arthritis, which actually happens to be the
21 largest category, and this is the detail in summary
22 fashion of an analysis of the lost profit s and
23 reasonable royalty in the U.S. on rheumatoid arthritis.
24 This is done for each indication, and that's part of
25 these documents.

1 And then I mentioned the concept of
2 switching and what's the source of the patient.
3 Exhibit 544 is a good example of that, and that is --
4 shows percentages in the disease ankylosing and
5 spondylitis of where users of Humira come from. 46
6 percent under Remicade would be -- 46 percent would have
7 been Remicade failures, and 54 percent would have been
8 Enbrel failures.

9 So there are 60 of these documents. We
10 submit under Federal Rule of Evidence 1006 that these
11 are calculations and summaries, and in a case of this
12 nature where the damages calculation is highly complex,
13 involves voluminous documents, that the Court can and
14 should permit the use of summaries which these are.

15 THE COURT: Well, is it your representation
16 that the exhibits you wish to offer are summaries of
17 both the sales and P and L data in addition to the
18 opinions of your exhibit which are going to be offered
19 at the time of trial?

20 MR. SAYLES: They -- it is his opinion as to
21 what the result is. It's his calculation actually of
22 damages.

23 THE COURT: In addition to the hard data
24 that's contained in the --

25 MR. SAYLES: Yes.

1 THE COURT: -- the documents themselves.

2 MR. SAYLES: Yes, it is.

3 THE COURT: But you're going to -- okay.

4 MR. SAYLES: Yes, it is.

5 THE COURT: What's the response?

6 MS. WIGMORE: The response, Your Honor, is
7 that that's precisely the problem. These are opinion
8 documents. They should not be pre-admitted for the
9 truth. That's his position. If he wants to use
10 demonstratives, we would have no objection upon review
11 in advance, but these are not just summary documents.
12 They are his using his methodology to calculate lost
13 profits and reasonable royalty.

14 So to pre-admit an exhibit that says this is
15 the lost profit is basically just allowing their
16 opinions to become evidence in the form of a written
17 document.

18 We think this should be used with the
19 witness as a demonstrative but not admitted in evidence,
20 and we would reserve the right to object to some of
21 them. There are over 100 on their list, 56 of which
22 Mr. Sayles has just referenced.

23 MR. SAYLES: We removed all but the ones
24 that I referenced, and I think you were advised.

25 THE COURT: Well, but doesn't 1006, though,

1 allow the Court to admit summaries of both voluminous
2 documents as well as the testimony that's offered at the
3 time of trial?

4 MS. WIGMORE: I don't believe that 1006
5 allows for an expert's opinion, including the underlying
6 calculations, which are not even revealed on these
7 documents to go back as an exhibit offered for the
8 truth.

9 THE COURT: Okay. Well, I'll carry that
10 objection. Ordinarily, Mr. Sayles, I would let them be
11 used as demonstrative purposes, but I understand your
12 argument --

13 MR. SAYLES: Yes, sir.

14 THE COURT: -- that based on the -- the
15 complexity of this particular calculation, I'm going to
16 look at -- I'll look at 1006. If I think they qualify
17 as summary under the Fifth Circuit case law, I'll let
18 them, okay?

19 MR. SAYLES: All right, sir. Yes, sir.

20 MS. WIGMORE: Your Honor, just for
21 clarification, are they being let in or are we --

22 THE COURT: I'm carrying the objection.

23 MS. WIGMORE: Okay. Thank you.

24 THE COURT: Okay? This wasn't one of the
25 categories that was revealed in the letter that you sent

1 me last night, so I hadn't pulled --

2 MR. SAYLES: Well, Judge --

3 THE COURT: -- pulled my case law out yet.

4 MS. WIGMORE: Understood.

5 MR. SAYLES: I think for 63 documents, I'm
6 in a tie on those, and so those are the ones that I'm
7 prepared to address and that I've offered, and I will
8 yield to my colleagues to address the other categories
9 if it please the Court.

10 THE COURT: Okay. Thank you, Mr. Sayles.

11 MR. MASLOWSKI: May it please the Court.

12 Steven Maslowski for Centocor.

13 Your Honor, I'd like to start by addressing
14 the marketing documents, and the first category of
15 marketing documents to which I'll refer to include
16 Exhibits 87, 579, 582 through 585, 587, 590, 591, 593
17 through 649 and 679 through 685.

18 These are all identical documents, and all
19 of the document exhibit numbers that I just read which
20 Centocor seeks to have admitted into evidence are market
21 research monthly reports of Abbott's, and they are
22 month-by-month reports that are prepared by Abbott's
23 marketing department to assess the competitive landscape
24 in this business.

25 Abbott has objected primarily on hearsay

1 grounds. There were a few foundation grounds. They're
2 clearly Abbott documents. They're not hearsay. They're
3 admissions by Abbott, and Centocor seeks to have them
4 admitted into evidence.

5 MS. WIGMORE: Your Honor?

6 THE COURT: What's the objection?

7 MS. WIGMORE: The objection is that many of
8 these documents contain embedded hearsay and opinion.
9 We understand --

10 THE COURT: Of whom?

11 MS. WIGMORE: Of sometimes surveys that were
12 taken from physicians or customers.

13 THE COURT: Who commissioned the surveys?

14 MS. WIGMORE: It often was Abbott, or they
15 would attend a conference where material was discussed.

16 And we don't have an objection, per se, to
17 the use of these documents. Our problem is that the
18 sheer volume and not knowing the purpose for which
19 they'll be used, what portion of the documents will be
20 used. We've been trying with Centocor and NYU's
21 attorneys to narrow the group and reach some global
22 agreement since we have similar documents which we have
23 tried to narrow down.

24 As of last night -- and some have been
25 withdrawn, but as of last night, there were

1 approximately 172 of these types of documents, some
2 Abbott, some Centocor, on Centocor's list. We had
3 narrowed ours down to approximately 21.

4 So our problem is to agree in the abstract
5 of these coming into evidence without any indication
6 they'll use them with a witness. They'll just be dumped
7 into the record. Who knows what purpose they'll be used
8 for.

9 So we'd prefer either that we narrow down
10 the list and reach a global agreement or require that
11 they be used with some witness so that we can cross
12 examine on those aspects that are hearsay, not just
13 Abbott statement hearsay, but third-party statement
14 hearsay.

15 THE COURT: Well, can't you call a witness
16 that was involved in preparing your documents?

17 MS. WIGMORE: Well, our problem is we don't
18 know which ones they're going to use. There are more
19 than 100 of them. If we can narrow down the list, we'd
20 be happy to reach an agreement, but it's just too long
21 of a list and too voluminous documents to agree in
22 advance to have these admitted into the record.

23 THE COURT: Well, I'm going to overrule the
24 objection. I'll pre-admit those, and I'm going to do
25 likewise with respect to your -- the documents that you

1 wish to pre-admit that fall under the same category.

2 Okay. What's the next category?

3 MR. MASLOWSKI: Your Honor, time -- well,
4 I'll address another category that are similar Abbott
5 documents, and I think they may fall into the same
6 category.

7 These are different types of studies. These
8 are, again, Abbott business documents commissioned by
9 Abbott. They do them routinely. For example, this
10 document, which is Exhibit 379, is a -- what's called a
11 Gastro ATU whereby Abbott assesses the gastro views or
12 assesses the views that gastroenterologists in the
13 market understand the market and understand physician
14 perceptions.

15 A number of these documents, which include
16 Centocor, are Plaintiff's Exhibits 297, 299, 378, 379,
17 380 through 383, 386, 387, 389, 390, 458, 677, and 678.

18 Centocor seeks to have those documents
19 admitted into evidence. As with the last category of
20 documents, Your Honor, again, these are not hearsay.
21 The objection stated is hearsay. They're not hearsay.
22 They're Abbott documents. Yes, they include third-party
23 studies, as well, but those statements as well as with
24 the previous documents do not qualify as hearsay because
25 Abbott has adopted a belief in their truth under 801

1 they're not hearsay, and these documents are admissions
2 by Abbott. They should be admitted into evidence.

3 THE COURT: Tell me what exhibit number
4 this --

5 MR. MASLOWSKI: The one you're looking at,
6 379.

7 THE COURT: -- this exemplar is.

8 MR. MASLOWSKI: And to put these marketing
9 documents in context, Your Honor, their attack on our
10 damages/lost profits analysis is that their expert
11 opines that there's insufficient data in this case to
12 calculate lost profits in this market.

13 Our expert, in fact, relied on all of these
14 types of documents in calculating lost profits. So,
15 unfortunately, the volume of the evidence is directly
16 relevant to the issues in this case.

17 THE COURT: Is it your representation that
18 379 is representative of that category?

19 MR. MASLOWSKI: That is correct, Your Honor.

20 THE COURT: All right. Same objection?

21 MS. WIGMORE: Same objection. This
22 Exhibit 379, I believe you'll see there are quotations
23 from physicians that appear in the document. We
24 disagree that just because a statement appears in an
25 Abbott document it's an adoptive admission.

1 That is hearsay, and, again, we think this
2 needs to be addressed on a case-by-case basis so at the
3 very least, the hearsay nature of the -- the documents
4 or the portions of the documents we're concerned about
5 could be brought out. Again, you know, a dump into the
6 record of hundreds of documents without any context
7 is -- we view that as a troubling concept and think they
8 should be used through a witness at trial.

9 THE COURT: Okay. I'll overrule the
10 objection, as well. Those are pre-admitted.

11 MR. MASLOWSKI: Your Honor, in the interest
12 of minimizing our time here, I'm going to yield the
13 floor to my colleagues to move a couple more categories
14 forward, and I'll be back up on other marketing issues.

15 THE COURT: Okay.

16 MR. PEARSON: Your Honor, I have three
17 categories of documents. First, there are several
18 scientific publications, one of which I'm putting up
19 here, PX 48.

20 This is an article from the Lancet in 1993
21 that describes the use of the antibodies, anti-TNF
22 antibodies that treat disease. In fact, this study is
23 one of the examples in the patent. So that's -- we
24 submit that's its relevance. It describes the use of
25 some of the antibodies that are part of the invention

1 for treating Crohn's disease.

2 THE COURT: What's the objection?

3 MS. WIGMORE: Our objection to this
4 category, Your Honor, is a relevance objection. It
5 appears they're being used for the purpose of trying to
6 demonstrate commercial success which goes to the issue
7 of obviousness.

8 We have objections on two grounds. One is
9 perhaps not quite ripe, and as we're reaching a
10 stipulation as to the chimeric claims and whether they
11 will be dropped from the case, to the extent that
12 occurs, this commercial success related to Remicade is
13 not a relevant issue in the case.

14 Secondly, this goes to the use of Remicade
15 and certain disease conditions. Patents -- there are
16 separate patents on those uses that are not being
17 asserted in this case. So to the extent the drug is
18 commercially successful because of its use, that is not
19 a proper analysis for this case. It will confuse the
20 jury.

21 MR. PEARSON: Your Honor, if I may, the --
22 as I said, the work that's described here is one of the
23 examples in the patent to describe --

24 THE COURT: Well, why isn't it cumulative,
25 then?

1 MR. PEARSON: Well, I think it's -- it
2 describes in more detail than the example that is
3 admittedly briefed in the patent document itself, and
4 this isn't submitted -- I submit it's not being offered
5 for commercial success but only to describe the work
6 that was actually done. This reports medical results,
7 not commercial success.

8 MS. WIGMORE: Your Honor, to the extent
9 they're not asserting claims that cover Remicade, it's
10 not clear --

11 THE COURT: Well, that's my question.
12 What -- I mean, I guess what's the status of the claim
13 that there's a discussion about whether or not it's
14 going to be removed from the lawsuit? Does it have
15 relevance beyond that claim, and if so, how? That's my
16 question.

17 MR. PEARSON: I'm sorry. I submit it does
18 have relevance, and we are going to have to discuss the
19 disclosure that's in the patent document that's coupled
20 to all the claims, and we're going to have one of the
21 inventors talking about the work that was done, and he's
22 going to talk about what's in his patent.

23 This is one of -- one of the things that's
24 described in the patent, but it's described in more
25 detail in this document. So that's the relevance.

1 THE COURT: Okay. All right. I'm
2 overruling the objection. I think it's relevant.

3 MR. PEARSON: I have one other technical
4 document. This is actually a technical document relied
5 on by Centocor's expert, Greg Adams. Again, I think
6 there's a relevance objection.

7 It's about the production of human
8 antibodies, which is a point of dispute between the
9 parties. Our expert has listed it in his report and
10 relied on it in his report. That's its relevance.

11 MS. WIGMORE: We are willing to withdraw our
12 objection to this one, Your Honor.

13 THE COURT: Okay.

14 MR. PEARSON: Your Honor, so just to be
15 clear on the record, that was Exhibit 407.

16 THE COURT: 407 is pre-admitted. What was
17 the exhibit number of the previous exhibit?

18 MR. PEARSON: Your Honor, it was PX 48.

19 THE COURT: 48, okay. 48 is pre-admitted.

20 MR. PEARSON: The second of the three
21 categories of documents that I have are witness
22 statements submitted on behalf of Abbott in a prior
23 litigation.

24 This is describing the development of the
25 accused product. In fact, Dr. Salfeld will be a witness

1 in this case. But this is a statement that's been
2 adopted by Abbott describing the process for developing
3 the accused product.

4 I'm sorry, for the record, that's PX 744,
5 and similar documents are PX 745, PX 416, and PX 443.

6 MS. WIGMORE: Our objections here are
7 twofold, Your Honor. First of all, this is an
8 out-of-court statement. It is hearsay. It's a foreign
9 court. The witness will be here to testify. If they
10 wanted to use something from this for impeachment,
11 that's an option, but to have this come in
12 independently, it's a different case involving different
13 issues. We think it'd be irrelevant and prejudicial.

14 Also, to the extent they're trying to bring
15 in other litigation generally, both of these parties
16 have been involved in much litigation involving the
17 products in this lawsuit, and that can be very confusing
18 and prejudicial, and there are real relevance questions
19 about that. So we would object generally to bringing in
20 the existence of or the facts surrounding other
21 litigation into this case.

22 MR. PEARSON: Your Honor, I think what --
23 there are -- what's in these statements are very basic
24 descriptions of what was done to develop the product.

25 So there aren't -- I would submit we're not

1 offering it to provide details specific only to this
2 litigation, but they have made statements that have been
3 adopted by Abbott and submitted to a court in this
4 litigation about how their product was developed.

5 MS. WIGMORE: And our position is the
6 witness will be here. They can ask those questions. If
7 he doesn't answer consistently, they can impeach
8 him, but to put a statement from another litigation into
9 the record will be very confusing and perhaps
10 prejudicial because the fact that we've been involved in
11 other litigation, as have they, will be confusing and
12 prejudicial to the jury.

13 THE COURT: Ordinarily, I would, and I think
14 Judge Ward would follow the same rule, is that before
15 you launch into other litigation, I mean, you can use
16 statements that are made in other litigation, but you
17 need to refer it, you know, like a prior statement made
18 under oath or something to -- to that effect.

19 I'm not going to pre-admit the declarations,
20 but, you know, given the representation that the
21 witnesses are going to be here at trial, you can cross
22 examine them just -- you know, you can impeach them
23 with the statements that they've made, you know, at the
24 time they testify, and if for some reason they don't
25 show up at trial, then approach Judge Ward about

1 offering them as adoptive admissions, okay?

2 MR. PEARSON: Understood.

3 THE COURT: But I don't -- given that
4 they're -- that they were submitted in other litigation,
5 you can use them for impeachment if they say something
6 different here, but I'm not going to pre-admit them,
7 okay?

8 MR. PEARSON: The third document that I
9 have, and it's just a single document of its type that
10 we're going to offer, is Plaintiff's Exhibit 854.

11 This is a laboratory notebook. The first
12 page is here. Essentially what this is is a Centocor
13 employee who did some experiments on the antibodies at
14 issue in this case. This is just a contemporaneous
15 recording of the experiments that she did and the data
16 that she observed. She's going to be testifying, so we
17 would want to admit this with her. She can describe
18 what she did and describe that she recorded
19 contemporaneously with when she did it.

20 THE COURT: Why isn't it admissible?

21 MS. WIGMORE: Your Honor, we've had
22 communications about these documents, and I think we can
23 reach an accommodation. We have similar documents that
24 they've objected to.

25 THE COURT: Well, I'm going to admit those,

1 too, then, just like I'm admitting this one, okay?

2 MS. WIGMORE: As long as all the lab
3 notebooks of the -- these are testing --

4 THE COURT: If they're contemporaneous
5 testing that's done in the ordinary course of business
6 of the employees, then it's coming in.

7 MR. PEARSON: So, Your Honor, I would submit
8 that some of these -- there are some differences between
9 the notebooks. One of the difference is whether it's
10 done in the ordinary course. The second difference is
11 whether a person is going to be able to testify this is
12 what they were doing, contemporaneously recording the
13 observations. This particular witness will be in court
14 discussing the notebook results.

15 THE COURT: Well --

16 MR. PEARSON: And so I would submit this
17 document is different from the other notebooks, so we
18 are admittedly going to continue to discuss --

19 THE COURT: Well, if I admit them as
20 business records, I mean, that's -- I mean, that's why
21 you're offering to admit this, right?

22 MR. PEARSON: I'm admitting this as a
23 contemporaneous recording of what she's perceiving --

24 MS. WIGMORE: I just want to clarify, this
25 was testing she did for litigation purposes.

1 MR. PEARSON: This was done for the
2 litigation.

3 THE COURT: Okay.

4 MS. WIGMORE: And so our feeling is that can
5 come in as long as our testing for litigation purposes
6 comes in, as well, but it shouldn't be a one-way street.

7 MR. PEARSON: And I would submit that it
8 should make a difference whether the witness can testify
9 about what they were doing and contemporaneously record
10 the results of the experiment. That makes this notebook
11 different from the others.

12 MS. WIGMORE: And our view is if it's not
13 hearsay and it comes in, there doesn't need to be a
14 witness --

15 THE COURT: A sponsoring witness for the
16 same reasons -- not just allow in all of the marketing
17 documents.

18 That's -- you know, you can't have it both
19 ways. You need to -- I mean, if you're going to have --
20 if you're going to require sponsoring witnesses for your
21 exhibit, then -- then I'm going to allow that rule
22 across the board, but if --

23 MR. PEARSON: Well, I would -- I would
24 just -- I will submit that whatever happens with this
25 document, I don't think it should apply to the other

1 documents.

2 THE COURT: Okay. Well, I'm --

3 MR. PEARSON: I don't know --

4 THE COURT: I'm admitting this -- I'm
5 admitting this document, okay, and I'll take theirs up
6 separately.

7 MR. PEARSON: Thank you. That's all I have.

8 THE COURT: Okay.

9 MS. VERRECCHIO: Your Honor, Angie Verrechio
10 for plaintiff, Centocor. I have a couple of categories
11 of documents that I'd like to discuss. The first
12 relates to e-mails that appear on our list that are a
13 couple of different categories. PX 40 through 47, PX
14 130 through 132, PX 155 through 161, PX 400 through 403,
15 and PX 80 through -- I'm sorry, 800 through 807.

16 There's two different types of e-mails here.
17 One type is e-mails written by Centocor employees to
18 other Centocor employees describing conversations that
19 they had with Abbott employees. There are numerous
20 discussions that went on before this lawsuit was filed,
21 negotiations between the parties over various licensing
22 issues and business issues.

23 And at one point, Centocor learned about --
24 that their patent claims that are subject of this suit
25 were going to issue from the patent office, and Centocor

1 employees told that to Abbott, and there are e-mails
2 between Centocor employees referencing that those
3 discussions took place, and one of the issues in this
4 case is notice, that Abbott had sufficient notice. So
5 we think that these e-mails are relevant and should come
6 in.

7 And I will show you an example. This is PX
8 158. This is an e-mail from Ken Dow, who is a Centocor
9 in-house counsel, to other Johnson and Johnson, Centocor
10 business people Bernie Plantz and Phil Johnson, saying
11 that he received a call from John Conway, who is
12 Abbott's in-house counsel, about the TNF patent claims
13 and whether any testing was done.

14 This is dated January 6, 2006, which is
15 shortly after Centocor learned about -- that their
16 claims were going to be allowed and formed Abbott. So
17 we submit that these documents are business records
18 because this is the types of things that Centocor
19 people, how they record this kind of information and
20 share it with their fellow colleagues, and it's not
21 hearsay, so we think it should come in.

22 THE COURT: How is it different -- how is it
23 different from a phone call?

24 MS. VERRECCHIO: Because it's a recorded
25 recollection that's --

1 THE COURT: What -- well, what --

2 MS. VERRECCHIO: And I should say that
3 Mr. Dow will be at trial and could be cross examined on
4 these e-mails. There are other e-mails that were
5 written by another Centocor employee named Joe Scodari
6 of a similar type, and he will also be at trial to
7 discuss them.

8 THE COURT: Well, have y'all looked at Judge
9 Rosenthal's opinion on the Canatxx case against
10 Silverhawk about the admissibility of e-mails as
11 business records?

12 MS. VERRECCHIO: I have not, Your Honor.

13 THE COURT: Well, at least as I understand
14 the opinion, the touchstone is whether or not there
15 was -- the employer imposed a business duty on the
16 employees to make and keep e-mail records such as this
17 one.

18 So what's the -- what's Centocor's -- I
19 mean, is it a business requirement of Centocor that the
20 employees communicate like this?

21 MS. VERRECCHIO: It's my understanding that
22 this is the way that business is conducted at Centocor,
23 that e-mails are exchanged among Centocor individuals to
24 keep everyone informed. If we were able to elicit
25 testimony from Mr. Dow at trial to authenticate these

1 records as business records, we would be willing to do
2 that.

3 THE COURT: Okay.

4 MS. VERRECCHIO: If they could come in.

5 THE COURT: I'll give you the cite. It's
6 2008 Westlaw, 1999234.

7 MS. VERRECCHIO: Okay.

8 THE COURT: Canatxx Gas Storage against
9 Silverhawk Capital. What I'll do is I've looked at the
10 e-mails before I came in here, and I agree that they can
11 qualify under certain circumstances as business records,
12 but -- and I'm going to -- I mean, you need to lay a
13 foundation or call a witness who can lay a foundation as
14 to what the employer's practices are insofar as making
15 and keeping e-mails.

16 They touch upon a business matter, they're
17 made by employees at or near the time that the matters
18 are recorded, and they're made with employees with
19 personal knowledge of what's recorded, I agree with all
20 of that, but I think there's -- you need to put on some
21 testimony about what the business requirements of
22 Centocor is, okay?

23 MS. VERRECCHIO: Yes. Thank you.

24 MS. WIGMORE: Your Honor, just one other
25 issue with those e-mails, and that was our position that

1 they would need to lay the business record foundation.

2 THE COURT: Right.

3 MS. WIGMORE: But many of them contain also
4 embedded hearsay. So we would want these to be handled
5 on a case-by-case basis to ensure that statements within
6 the e-mails, even if the e-mail itself overcomes the
7 hearings objection, do not come in unless there's
8 another exception or a foundation for those.

9 THE COURT: Well, which ones contain
10 embedded hearsay?

11 MS. WIGMORE: There are several of them.
12 There are 36 documents that she just referenced, but
13 oftentimes it will be a witness from Centocor writing an
14 e-mail to Centocor people saying, you know, this is what
15 Abbott told us, but also this is what we told Abbott,
16 and that is another layer of hearsay.

17 So -- and there are also some relevance
18 issues that we have with some of the discussions in
19 these e-mails that we want to preserve the right to
20 object to. We're not sure which ones they're actually
21 going to use, but there's a lot of detail, and these are
22 not all one of a kind.

23 THE COURT: I tell you what, by close of
24 business Monday, identify for me which in the list you
25 say contain embedded hearsay.

1 MS. WIGMORE: Okay.

2 THE COURT: I want to get as many -- and the
3 reason I'm asking you to do that is I want to get as
4 many of these pre-admitted as I can. That's my charge
5 from Judge Ward, okay, not to say let's do them all on a
6 case-by-case basis. That's inconsistent for the purpose
7 for which these hearing is being held, okay?

8 MS. WIGMORE: Understood.

9 THE COURT: But I want to work through as
10 many of them as I can, okay --

11 MS. WIGMORE: Okay.

12 THE COURT: -- before y'all roll out on the
13 22nd.

14 MS. VERRECCHIO: And I just want to address
15 one of the objections that had been lodged to the
16 e-mails. There's an objection to -- an FRE 408
17 objection raised to several of the e-mails, which we
18 think has been addressed by Judge Ward in --

19 THE COURT: I read the transcript. I
20 thought it had been addressed, as well.

21 MS. VERRECCHIO: Right.

22 THE COURT: The negotiations, as I
23 understood it, went from the date that y'all learned
24 about the issued claims to at least April of 2007,
25 either the day of or the day after the case had been

1 filed. Is that --

2 MS. VERRECCHIO: Correct.

3 THE COURT: Is my reading correct?

4 MS. VERRECCHIO: It was not settlement
5 negotiations. It was --

6 THE COURT: It was licensing business
7 negotiations as I view it.

8 MS. VERRECCHIO: Correct.

9 THE COURT: And I think that Judge Ward held
10 the same thing.

11 MS. VERRECCHIO: Okay.

12 THE COURT: What I also need from you by
13 Monday is a representation that you -- think that you
14 think that you can offer testimony that's consistent
15 with the requirements that Judge Rosenthal laid out in
16 this decision, and I'll conditionally admit them based
17 on that representation if -- if I've worked through the
18 hearsay problems that your colleague opposing you has
19 identified for me, okay?

20 MS. VERRECCHIO: Yes. Thank you.

21 Another category of documents that we would
22 like to discuss include Exhibits 391 through 393, and
23 this is a representative document. These are --

24 THE COURT: Which exhibit is this?

25 MS. VERRECCHIO: This is 392, PX 392. These

1 are documents that lay out kind of a plan that Abbott
2 had to run its biological -- biologic business and to
3 seek IP opportunities, and there are statements made in
4 here -- I apologize for the scribbled highlighting.
5 This is Page 30 of the document. This talks about
6 Abbott's IP business strategy that they would seek to
7 take a license, if necessary, to move into an IP space,
8 but, if not, if they could not seek a license, if a
9 license was not available, they would pursue an
10 aggressive risk management approach.

11 And the reason that we think these documents
12 are relevant and should be admitted is because one of
13 the issues in this case is willfulness, and in
14 evaluating willfulness, the jury is allowed to review
15 the totality of the circumstances and part of the
16 totality of the circumstances in this case can be
17 Abbott's approach to pursuing IP opportunities or moving
18 into additional space. And the -- the strategy that
19 they take to pursue those goals could be relevant to
20 their willfulness in this case in not seeking a license.

21 MS. WIGMORE: Your Honor, our objection here
22 is both a relevance and Rule 403 objection. There's no
23 reference to Humira, the product at issue, in any of
24 these documents. There's no foundation that a license
25 was available at the same time they're indicating

1 there's license discussions going on.

2 So this is just very confusing and
3 prejudicial. There's no indication it has anything to
4 do with the facts of this case.

5 THE COURT: Well, I overrule those
6 objections.

7 MS. VERRECCHIO: And, Your Honor, the last
8 category of documents I want to talk about are Exhibits
9 184, 185, and 189. And these are memos that were
10 written by BASF, which was the predecessor company to
11 Abbott. It was a company that Abbott acquired that
12 actually developed the accused product in this case, and
13 they reflect BASF's knowledge of what Centocor was doing
14 to develop its product and -- and show that BASF
15 recognized that Centocor's product was a surprising
16 result in the field, that it showed remarkable results
17 in patients. We think that these are business records.

18 THE COURT: And which product is it that the
19 documents are referring to?

20 MS. VERRECCHIO: They're referring to
21 Centocor's Remicade product.

22 MS. WIGMORE: And our objection is similar
23 to one I've already raised about the relevance of
24 Remicade and the use as opposed to the actual antibody,
25 which they've got separate patents on that aren't at

1 issue here.

2 THE COURT: Are the claims -- are these
3 Remicade claims, are they in or out in this case?

4 MS. VERRECCHIO: Well, we're working on a
5 stipulation to that effect. Without making a firm
6 representation on the record --

7 THE COURT: If you were betting, if you were
8 me, would you bet that they'd be in or out?

9 MS. VERRECCHIO: If I were you, I would bet
10 they would be out.

11 THE COURT: Okay. Now, then, okay. I
12 appreciate this. I'm not going to, but I just -- tell
13 me what the relevancy is if those claims are out of the
14 case. I was having a hard time thinking of one, too, so
15 I'm not pre-admitting those. I'll sustain the
16 objection.

17 What's the next category?

18 MS. VERRECCHIO: That is all I have at the
19 moment, Your Honor. I will turn it over to my
20 colleagues to address anything else that we might have.

21 MR. MASLOWSKI: Your Honor, I have a couple
22 volumes of Centocor marketing documents that didn't make
23 their way to you yesterday. I'm sorry, may I approach,
24 Your Honor?

25 THE COURT: Yes, of course, if you're giving

1 me a choice.

2 MR. MASLOWSKI: You know what, I will give
3 you 1 and 3 -- Volume 1 -- just Volume 1. These two --
4 they're all identical. I can address these pretty easy.

5 MS. WIGMORE: Steve, could you tell me the
6 number -- the exhibit numbers or if you could read
7 them --

8 MR. MASLOWSKI: Yes, I will read them into
9 the record.

10 MS. WIGMORE: Thank you.

11 MR. MASLOWSKI: Your Honor, I'd like to
12 address some more marketing documents. The first
13 category of documents are Centocor market studies.
14 These are very similar to the Abbott documents which
15 have already been admitted into evidence.

16 The first cat -- the first specific category
17 we'll address, Plaintiff's Exhibits 247 through 253,
18 255, 256, 258 through 266, 454, 459, 710 through 718,
19 725 and 726.

20 THE COURT: And what are these studies
21 generally about?

22 MR. MASLOWSKI: These are very similar to
23 the Abbott studies. These are studies of doctors'
24 perceptions in the marketplace for the drugs that are at
25 issue in this case, as well as what are called claims

1 data studies where Centocor pulls the claim charts of
2 actual patients and attempts to understand the physician
3 preferences in the market.

4 THE COURT: These would have been written by
5 your client, then --

6 MR. MASLOWSKI: That's correct.

7 THE COURT: -- at the same time these
8 licensing negotiations were going on?

9 MR. MASLOWSKI: Same time as the licensing
10 negotia -- yeah, these are done in the ordinary course
11 of business by the marketing documents. These documents
12 are entirely separate from any of the --

13 THE COURT: Okay.

14 MR. MASLOWSKI: -- well, licensing
15 discussions.

16 THE COURT: Okay.

17 MR. MASLOWSKI: So in that sense, they
18 are -- they would qualify as business records under the
19 hearsay objection.

20 MS. WIGMORE: Our position on these are
21 these are Centocor documents as opposed to the Abbott
22 ones we looked at previously. Again, they have a lot of
23 embedded hearsay, but this is a case where they're
24 trying to use their own documents which contain some
25 third-party data without laying any foundation, and we

1 believe it's appropriate for them to have to lay one
2 before the documents get used.

3 THE COURT: Well, I'm going to sustain the
4 objection to these documents. You know, I don't -- you
5 know, I admitted the Abbott documents on the grounds
6 that they were admissions of Abbott that contained
7 material and that Abbott had -- studies that had
8 commissioned, and I've just got some concern with these
9 types of documents being created by the party that's
10 then going to offer them in evidence to use in
11 litigation, so I'm going to exclude those documents.

12 MR. MASLOWSKI: Your Honor, will we have the
13 ability to introduce these documents through a witness
14 at trial subject to cross examination?

15 THE COURT: Well, they're not pre-admitted,
16 so I'm sustaining the objection at this point. If you
17 think something develops during the trial that you can
18 lay a proper foundation, get them admitted during trial,
19 you can attempt to do that.

20 MR. MASLOWSKI: Okay.

21 THE COURT: Okay?

22 MR. MASLOWSKI: One particular exhibit that
23 does relate to the licensing negotiations is Plaintiff's
24 Exhibit 465. Centocor seeks admission of Plaintiff's
25 Exhibit 465, and what Exhibit 465 is, this is an e-mail

1 from an Abbott employee, Susan Lebold, to John Poulos,
2 who is going to be a trial witness, and the subject of
3 the e-mail relates to the licensing discussions that
4 went on between the parties.

5 In particular, on Page 2 of the attachment
6 to the e-mail, it says, history of discussions with J&J,
7 and then it goes on to lay out bullet point-by-bullet
8 point the licensing discussions that occurred between
9 Abbott and Johnson and Johnson to which we've previously
10 discussed.

11 Mr. Poulos testified in his deposition that
12 he recognized the document. In fact, he asked
13 Ms. Lebold to create the document. And we submit that
14 it is not hearsay. It is --

15 THE COURT: Well, now, tell me again who the
16 author works for.

17 MR. MASLOWSKI: The author of the
18 attachment, Suzanne Lebold, an Abbott employee.

19 THE COURT: Okay.

20 MR. MASLOWSKI: And she sent it to the --
21 the e-mail went to John Poulos, also an Abbott employee
22 and also on Abbott's witness list.

23 THE COURT: And what's the objection?

24 MS. WIGMORE: The objection to the document
25 has to do with a specific portion where there's a

1 statement about valuation which in Mr. Poulos's
2 deposition he made clear was incorrect. So to the
3 extent this were used with a witness, we would have no
4 objection, but putting it in the record without that
5 context we believe would be inappropriate. There's an
6 opinion of valuation which -- which we think is
7 misleading.

8 THE COURT: Well, I'll overrule that
9 objection. The document is admitted.

10 MR. MASLOWSKI: Then two more broad
11 categories of Abbott marketing documents. The first
12 relates to Plaintiff's Exhibits 211, 294, 296, 298, 385,
13 576, and 578.

14 These documents, and I will show you
15 Exhibit 211, all generally relate to marketing
16 competitive studies. So this is -- it starts with an
17 e-mail from a Philip Yan to a Mr. Von Borcke, and cc'd
18 is Lori Taylor, Edward Scheidler and Thomas Filar.

19 Mr. Scheidler was deposed in this case,
20 testified about this document. All of the documents in
21 this category are Abbott internal presentations that
22 relate generally to marketing competitive studies, et
23 cetera. They were relied on by our expert and used in
24 his analysis. They're not hearsay. They're admissions
25 by Abbott.

1 THE COURT: Is your objection the same --

2 MS. WIGMORE: It's the same.

3 THE COURT: -- with respect to the other
4 Abbott --

5 MS. WIGMORE: It should follow the fortunes
6 of the others.

7 THE COURT: Well, I'll -- they're
8 misfortunes, right? Okay. Well, I'll overrule it for
9 the same reasons that I overruled the other objections.

10 MR. MASLOWSKI: And the last category of
11 Abbott documents in this area, Your Honor, are marketing
12 and strategic plans. These are just a little bit of a
13 different form. They're more official documents in the
14 sense that they are specific plans created by Abbott.
15 This would be -- this would cover Exhibits 94, 216, 218,
16 300, 375, 376, 377, 574, 575, and 577. Here is the
17 first page of Exhibit 94. All of these exhibits are of
18 this nature.

19 They are Abbott internal marketing documents
20 where Abbott is assessing the competitive landscape as
21 well as the -- the competition going forward. They're
22 all relevant. They were all used by our expert or
23 considered by our expert in preparing these opinions.
24 They're clearly admissions by Abbott.

25 THE COURT: Well, is there any different

1 objection to these.

2 MS. WIGMORE: No, Your Honor.

3 THE COURT: Okay. I'll overrule the
4 objections. I'll -- the record will reflect that the
5 same objections were made to these documents as were
6 made to the prior Abbott documents, and the Court
7 overruled them for the same reasons that it overruled
8 the other objection.

9 MR. MASLOWSKI: And I think I will yield the
10 floor to my colleagues again.

11 THE COURT: How many more categories have
12 y'all --

13 MR. PEARSON: Your Honor I have one --

14 THE COURT: -- created?

15 MR. PEARSON: -- one category.

16 THE COURT: Okay.

17 MR. MASLOWSKI: And I may have one or two.

18 MS. VERRECCHIO: And I have one.

19 THE COURT: Okay. Well, all right.

20 MR. PEARSON: This is going to be, I hope,
21 short, Your Honor. These are documents -- technical
22 documents written by employees -- currently employees of
23 Abbott Laboratories prior to when BASF Bioresearch
24 Corporation was acquired by Abbott Laboratories.
25 They're the kind of documents that describe experiments

1 both for the Humira antibody, that's the accused product
2 in this case, and, I'm sorry, I should say this is
3 Plaintiff's Exhibit 135. There's a similar document
4 that's Plaintiff's Exhibit 136. It is about experiments
5 done on the N195 antibody that's being asserted as prior
6 art.

7 So I submit these are just documents that
8 describe experiments done by BASF Bioresearch
9 Corporation, and these are now Abbott employees.

10 THE COURT: And Abbott acquired BASF?

11 MR. PEARSON: That's correct, Your Honor.

12 MS. WIGMORE: We're willing to address -- we
13 don't think this is going to be relevant, particularly
14 if the chimeric claims are not pursued, but this witness
15 testified she didn't really have personal knowledge of
16 what was written. We'll withdraw the objection just for
17 efficiency sake.

18 THE COURT: Okay. What were the numbers,
19 135 and 136?

20 MR. PEARSON: That's correct.

21 THE COURT: Those are admitted.

22 MS. VERRECCHIO: I just have one other group
23 of documents, Your Honor. PX 162, 163, and 164 are
24 documents that reflect conversations that employees at
25 BASF were having in the early '90ss before they decided

1 to partner with Cambridge Antibody Technology.

2 And this is a memo or minutes of a meeting
3 that BASF employees attended, as well as a CAT employee,
4 that indicates that Cambridge Antibody Technology had
5 already used its technology to make antibodies before
6 they partnered with BASF. And the objection to this
7 document is -- this is PX 162, and the objection to this
8 document is for relevance, and we believe it's relevant
9 because it shows that the state of the art at this time
10 indicated that CAT was using their technology, and it
11 goes to show that there was an enablement of this
12 technology at the time.

13 There are two other documents that I would
14 include in this category. This is PX 163, which are
15 some handwritten notes. It says at the top JS and Jay
16 Mankovich. We believe that JS is Jochen Salfeld, who is
17 going to be a witness in this case, and we would like to
18 question him about this document, and it relates to
19 whether other companies were partnering with CAT at the
20 time to make human antibodies and whether other
21 technologies were available.

22 It's this one that references a Genpharm
23 discussion, which is another company that was on the
24 scene offering services to make human antibodies, so
25 this all goes to enablement.

1 THE COURT: Where was Genpharm referenced?

2 MS. VERRECCHIO: Pardon me, Your Honor?

3 THE COURT: Where was that referenced,
4 Genpharm?

5 MS. VERRECCHIO: Genpharm, if you look at PX
6 164. I'm sorry, at the top.

7 THE COURT: Instead of 163.

8 MS. VERRECCHIO: Yes, at the top in the
9 title, CAT, slash, Genpharm discussions.

10 THE COURT: Okay. Tell me what your
11 objection is.

12 MS. WIGMORE: Our objection, it actually
13 should be a hearsay objection, as well, and for that, I
14 apologize, but what we have here is notes of
15 conversations with a third party, only portions of the
16 conversation. So we have an objection for the documents
17 coming in for the truth of the matter asserted by the
18 third parties.

19 If they want to cross examine Dr. Salfeld
20 about whether he had conversation and was on notice of
21 certain things, we have no objection to that, but we
22 object to the documents coming in for the truth of the
23 third-party statements.

24 MS. VERRECCHIO: And, Your Honor, I offer
25 that at least PX 162, which is the minutes of the

1 meeting that took place, should be -- should be --
2 should qualify as a business record which takes it out
3 of the hearsay objection.

4 MS. WIGMORE: I actually disagree with that.
5 I think it takes the document out but not the statement
6 by CAT.

7 THE COURT: I'm going to carry these. Well,
8 let me -- first of all, have y'all deposed someone with
9 personal knowledge of all of these documents? In other
10 words, is --

11 MS. VERRECCHIO: We have deposed Jochen
12 Salfeld only, and he will be -- and he's authored --
13 he's -- I'm sorry, he's listed on these documents, and
14 he will be, as far as we know, will be a witness at
15 trial.

16 THE COURT: With respect to these documents,
17 has he been questioned about them thus far?

18 MS. VERRECCHIO: I'll have to --

19 MS. WIGMORE: I believe they asked
20 Dr. Mankovich about these documents. He will not be
21 testifying, and there are no deposition designations for
22 him.

23 THE COURT: Well --

24 MR. PEARSON: The answer, Your Honor,
25 Dr. Salfeld has not been asked about these particular

1 documents.

2 THE COURT: My question is more just -- more
3 of a form question. Is there question about
4 authenticity or the fact that they were done in the
5 ordinary course of business at all? I mean, is there a
6 real question about it?

7 MR. PEARSON: I don't think so, Your Honor.

8 MS. WIGMORE: No, our issue is more about
9 the third-party statements.

10 THE COURT: The nested hearsay issues as
11 opposed to --

12 MS. WIGMORE: Right.

13 THE COURT: Okay. I'll look at those, and
14 I'll give you -- I'm going to carry the objections to
15 162, 163, and 164.

16 MR. MASLOWSKI: Last time for marketing
17 documents, Your Honor, I promise.

18 The last category of marketing documents
19 we're seeking admission are Centocor's strategic plans.
20 This would include Exhibit 697 through 704. Up on the
21 screen is Exhibit 697.

22 It's the 2007 Centocor strategic plan. All
23 of these documents relate to strategy and planning.
24 They are internal Centocor documents. They clearly
25 qualify as business records in our opinion. We

1 therefore seek admission of 697 to 704.

2 THE COURT: What's the objection?

3 MS. WIGMORE: Our objection is the same as
4 for the Centocor marketing documents which Your Honor
5 sustained. That these are -- and they are Centocor
6 documents, so they are hearsay, and there's a lot of,
7 again, embedded statements, so --

8 THE COURT: I'm going to sustain the
9 objection to these, as well, with the same caveat, that
10 if you lay a proper foundation for them at trial,
11 then --

12 MR. MASLOWSKI: Okay.

13 THE COURT: -- you may attempt to do so. Is
14 that it?

15 MR. MASLOWSKI: One last document, Your
16 Honor, which is Plaintiff's Exhibit 464. This is a
17 licensing -- the results of a licensing study
18 commissioned by the Licensing Executive Society, LES.

19 Abbott's stated document -- or Abbott's
20 stated objection is foundation and authenticity, which
21 our expert can lay the proper foundation and establish
22 that it's authentic, and, in fact, we have a declaration
23 from him would that be necessary. Abbott also indicated
24 this morning that they are submitting a hearsay
25 objection on this, as well. We submit that qualifies as

1 a commercial publication under 803.17. It's a
2 publication that people in this field generally rely on,
3 publications of this type.

4 MS. WIGMORE: And we do have an objection
5 primarily on hearsay grounds to the pre-admission of
6 this exhibit. We have no problem with their expert
7 saying he relied on these types of documents, but we
8 object to it coming in for its truth.

9 THE COURT: Are you maintaining an
10 authenticity objection?

11 MS. WIGMORE: No.

12 THE COURT: Tell me what the exhibit number
13 is again.

14 MR. MASLOWSKI: It is 464, Your Honor.

15 THE COURT: Why doesn't it qualify as any
16 type of market report under the hearsay exception?

17 MS. WIGMORE: Well, just because it's a
18 market report doesn't make it not hearsay. You know, I
19 don't think there's been a foundation laid as to who
20 relies on this and when.

21 So we wouldn't have an objection to them
22 trying to lay such a foundation with their expert, but
23 we don't think it -- in and of itself that it does.

24 MR. MASLOWSKI: And that's precisely the
25 issue as to why we have a declaration here from our

1 expert so we could have it pre-admitted. He states what
2 the document is, that people in his business normally
3 rely on these types of documents, what the document is,
4 what it purports to be, et cetera.

5 THE COURT: Well, do you have his
6 declaration?

7 MR. MASLOWSKI: Yes, sir. If I may
8 approach.

9 THE COURT: Yes.

10 MR. MASLOWSKI: There is also an
11 exhibit reference, No. 465, which we're foregoing at
12 this point.

13 THE COURT: They're pre-admitted. I think
14 it qualifies under 803.17, the exception based on what
15 the proffer is so I'm going to pre-admit it.

16 MR. MASLOWSKI: Your Honor, that is all of
17 our comments on their objections to our exhibits.

18 THE COURT: Okay. We're going to take a
19 short break, 10 minutes, and then we'll take up the
20 defendant's exhibits.

21 COURT SECURITY OFFICER: All rise.

22 (Recess.)

23 COURT SECURITY OFFICER: All rise.

24 THE COURT: Please be seated.

25 All right. With respect to the defendant's

1 exhibits?

2 MS. WIGMORE: We just have a small handful
3 of disputed issues.

4 The first is Exhibit 337. I believe we've
5 provided you a copy of that yesterday, and this is
6 correspondence between the then president of Centocor,
7 Hubert Schoemaker, expressing an interest in obtaining a
8 human antibody.

9 Now, the individual who wrote the letter is
10 deceased, but we did discuss it in a deposition with
11 Dr. Siegel, and we have that testimony designated. So
12 we think this is a party admission. It's relevant to
13 the question of enablement since Centocor expressed an
14 interest in this human antibody but did not make one
15 during the relevant time period.

16 THE COURT: Tell me what exhibit number it
17 is again.

18 MS. WIGMORE: Exhibit 337, Defendant's
19 Exhibit.

20 THE COURT: Well, do you have a copy handy?

21 MR. PEARSON: Your Honor, I have a copy.
22 May I approach?

23 THE COURT: Yes. Okay. Now, tell me who
24 Mr. Hoffman -- or Dr. Hoffman is.

25 MS. WIGMORE: He was an individual from

1 another company to whom the president of Centocor was
2 corresponding, expressing an interest in obtaining
3 human antibodies, which is the claimed invention in this
4 case.

5 THE COURT: But he was the -- the letter is
6 from Dr. Hoffman to Dr. Schoemaker, correct?

7 MS. WIGMORE: That's correct.

8 THE COURT: Okay. And you deposed
9 Dr. Hoffman.

10 MS. WIGMORE: No, Dr. Siegel, who was a
11 Centocor employee, this document was in his files.

12 THE COURT: Okay. For what purpose is it
13 being offered?

14 MS. WIGMORE: It's being offered with
15 respect to our non-enablement claim. It tells the story
16 of how they were interested in making the antibody but
17 ended up creating a chimeric antibody. They now claim
18 they created a human antibody which we made several
19 years later.

20 THE COURT: Okay. Okay. What's the
21 objection?

22 MR. PEARSON: That it's hearsay, Your Honor,
23 so it is being offered for the truth of what's asserted
24 in the document, and it's not written by a Centocor
25 employee. It's written by a third party. So it's

1 hearsay. There's nothing been established to take it
2 outside of the hearsay rule. It is being offered for
3 the matter asserted.

4 THE COURT: Why is it not hearsay? I'm
5 looking at --

6 MS. WIGMORE: Well, we would be willing to
7 offer it for the limited purpose of just showing that
8 they were exploring this area and were on notice of
9 this. We've got further evidence in the record of
10 testing of human antibodies, but we think it goes to the
11 context of that.

12 MR. PEARSON: And, Your Honor, I would say
13 the only evidence this is of notice is that this third
14 party wrote a document that described a conversation.
15 That's hearsay.

16 MS. WIGMORE: There are other exhibits on
17 the list that reveal testing of the human antibody.

18 THE COURT: Okay. I am sustaining the
19 hearsay objection. I view this very similarly to how I
20 view the statement in the advertisement to which Abbott
21 objected to. When you started your argument, I assumed
22 that it was a Centocor, former president of Centocor who
23 had written the document.

24 MS. WIGMORE: I apologize for that, Your
25 Honor.

1 THE COURT: Well, I'm sustaining the
2 objection. It's without prejudice to your ability to
3 offer it at the time of trial if you think you can lay a
4 foundation if it goes to what was going on in the field
5 at the time for some non-hearsay purpose, but I am not
6 going to pre-admit 337.

7 MS. WIGMORE: Now, the next two exhibits are
8 450 and 470. I don't know if Your Honor has the binder
9 we provided yesterday. I apologize. I do not have an
10 extra copy, but I want to make sure you have what you
11 need before I go any further.

12 THE COURT: Before I tell you I don't have
13 one, I need to check my inventory. You know what the
14 title of the binder was?

15 MS. WIGMORE: I apologize, I don't. It was
16 delivered locally.

17 THE COURT: Is it 450?

18 MS. WIGMORE: And it's a Defendant's
19 Exhibits --

20 THE COURT: I've got it.

21 MS. WIGMORE: Okay. And I can explain the
22 context of these two. There is an antibody, CDP 571,
23 that we are alleging is anticipatory prior art. We
24 subpoenaed that antibody from the third party who made
25 it, had testing done by our expert, provided a sample of

1 the antibody produced through the subpoena to Centocor
2 for their own evaluation.

3 They are challenging the authenticity of
4 that antibody. We're not actually putting the antibody
5 in evidence, so whether or not there's a legitimate
6 authenticity objection is a question. We have obtained,
7 just because of that challenge, a declaration from the
8 people who produced this pursuant to a subpoena
9 indicating that it is what it purports to be. And under
10 902.11 of the Federal Rules, we believe that's
11 sufficient.

12 We don't believe you necessarily offer that
13 declaration into evidence, but to the extent they're
14 going to challenge our expert's ability to rely on
15 testing of this antibody, we have both that declaration
16 and the certificate of analysis that accompanied the
17 production of the antibody just to show that he was
18 reasonable and relying on testing of this antibody that
19 was produced by a third party.

20 THE COURT: Well, let me clarify something
21 for the record, you know, I admitted the document the
22 plaintiffs had offered based on the declaration of their
23 expert, Dr. Gering.

24 MS. WIGMORE: Yes.

25 THE COURT: Okay? Part of the reason for

1 this hearing is so y'all don't have to go through and
2 teach the jury an evidence class on the predicates of
3 admissibility when everybody knows that 900 in the
4 series foundation questions can be laid, and, likewise,
5 the hearsay objection foundations can be laid.

6 So what is the -- I understand you've got a
7 declaration stating that -- at least the statement of
8 the facility from which you got the antibody that is
9 what it purports to be. So what's the objection on that
10 ground?

11 MR. PEARSON: So the objection to DX 470 is
12 that unlike the Gering declaration, this has been
13 obtained from someone who has not been deposed, who's
14 not going to be a witness in this case, and wasn't
15 produced to us until after the close of discovery.

16 So under Rule 902, the declaration to
17 support the authenticity of the document, needs to be
18 disclosed to us with sufficient time to explore the
19 bases for the declaration. So the declarant in this
20 case is in the United Kingdom. She's made some
21 statements here that it's her understanding that certain
22 things are true. We haven't had the opportunity to
23 explore the basis for her understanding of the
24 authenticity of the document, and without an
25 authenticity and an establishment that the document is a

1 business record, Exhibit 450 remains hearsay.

2 MS. WIGMORE: And I just want to be clear,
3 we don't want these documents to come into evidence if
4 we can agree that our expert's testing on the antibody
5 comes in. So these are just backups. To the extent
6 they're saying this antibody that you obtained through a
7 subpoena and had a declaration and provided us a copy of
8 or a portion of, if they're going to say our expert's
9 testing can't come in because that antibody is not
10 genuine, then we have this to overcome that objection.

11 MR. PEARSON: And, Your Honor --

12 THE COURT: When was the declaration
13 tendered to you?

14 MS. WIGMORE: The declaration was not
15 tendered to us until after -- like one day after the
16 close of discovery. We did everything --

17 THE COURT: Not to you, but to --

18 MS. WIGMORE: The day we received it.

19 THE COURT: Okay.

20 MR. PEARSON: So it's --

21 THE COURT: The date -- give me the date.

22 MR. PEARSON: April 20th, okay.

23 MS. WIGMORE: April --

24 MR. PEARSON: So, Your Honor, what's at
25 issue here is not the admissibility of the testing.

1 There was a motion in limine before Judge Ward about the
2 testing. We're not seeking to exclude testimony from
3 their expert describing the testing, but to the extent
4 they're trying to offer these exhibits, that's what I
5 understood we're here to talk about.

6 THE COURT: I want to make sure that I have
7 an appreciation of what Judge Ward ruled. Well, I'm
8 going to overrule that objection -- those objections.

9 You have a list -- is it 4 --

10 MS. WIGMORE: 450 and 470.

11 THE COURT: 450 and 470 are pre-admitted.

12 MS. WIGMORE: So the next exhibit is 759,
13 Defendant's Exhibit 759. And what this is is a brochure
14 relating to the Galen Prize, which was a prize that was
15 awarded to Abbott and Humira.

16 We think that the fact that that prize was
17 awarded is relevant to the question of enablement since
18 they're claiming through documents offered earlier today
19 that they came first and that it was a success of
20 Remicade that inspired everything.

21 In addition, one of the named inventors on
22 their patent that they're asserting in this case, Jan
23 Vilcek, was on the committee who awarded that prize to
24 Humira, and we think that's highly relevant to the
25 question of whether, in fact, we made our invention or

1 simply, you know, whether they had enabled our invention
2 before we made it.

3 THE COURT: What's the objection?

4 MR. MASLOWSKI: That it's hearsay, Your
5 Honor. It's not clear to us actually what this exhibit
6 is. We have no problem with the testimony of their
7 witnesses talking about the Galen Prize and what it is
8 and if Humira won it or not. But the document itself,
9 it's not clear exactly what it is. To be honest, it
10 looks similar to an advertisement which we've addressed
11 earlier today.

12 THE COURT: I'm going to admit the exhibit.
13 759 is admitted.

14 MS. WIGMORE: The next one, just to discuss
15 briefly, I think it may already be resolved by the
16 discussions we had earlier about their commercial
17 success documents, but we have Exhibit 840, which is a
18 discussion between Centocor and some individuals from
19 the Kennedy Institute. It's basically a dispute over
20 who came up with the use of -- of Remicade for
21 rheumatoid arthritis.

22 We would only propose to offer this if they
23 bring in the documents relating to whether Remicade was
24 successful in those areas and whether that inspired us
25 to create Humira. So this is in the same category, and

1 we're happy to have the same approach applied with
2 respect to Exhibit 840 as with the defendant's Remicade
3 use documents we discussed, Your Honor.

4 THE COURT: Plaintiff's -- well --

5 MS. WIGMORE: Plaintiff's, excuse me.

6 THE COURT: Okay. Speak to that for me.

7 MS. VERRECCHIO: Well, irrespective of what
8 Ms. Wigmore just said, this document itself is hearsay.
9 It's similar to the document that Ms. Wigmore showed you
10 earlier that was written by Dr. Hoffman to Dr.
11 Schoemaker. This is authored by a third party, someone
12 at the Kennedy Institute to Dr. Schoemaker, and
13 everything that is said in this document is hearsay, so
14 it should not come in.

15 THE COURT: Okay. I'm going to sustain the
16 hearsay objection with the same instruction that I gave
17 you previously. If it comes to a point where you think
18 you've got a purpose for it other than the truth, then
19 you can offer it at that time, okay?

20 MS. WIGMORE: Yes. The -- only two more,
21 Your Honor.

22 No. 842, Defendant's 842, is a Centocor
23 presentation titled Human Anti-TNF Project Preliminary
24 Financial Analysis, and this relates to the investment
25 Centocor was making in the creation of its own human

1 antibody which is now called SIMPONI.

2 We think the investment in the project that
3 they engaged in to create a human antibody after they
4 have already claimed to have invented one is highly
5 relevant to their question of enablement.

6 THE COURT: And which is -- which Exhibit
7 No. 842, and what else --

8 MS. WIGMORE: No, there's one more category,
9 and then we're done, but this was the only one on that
10 topic.

11 THE COURT: But it's a Centocor document?

12 MS. WIGMORE: Yes.

13 THE COURT: Okay. What's the objection to
14 that?

15 MS. VERRECCHIO: We believe we've withdrawn
16 that objection, Your Honor.

17 THE COURT: 842 is admitted.

18 MS. WIGMORE: And then the last category I
19 have relates to Exhibits 877 and 878. These are both
20 reports on a Deutsche Bank Healthcare Conference in
21 which Johnson and Johnson, the parent company of
22 Centocor, participated where one of their executives
23 make statements about how this new human antibody
24 product Centocor has launched will be complimentary to
25 and not compete with Remicade.

1 We believe that's highly relevant to the
2 damages issues in this case since they're claiming lost
3 profits that Humira has allegedly taken from Remicade.

4 THE COURT: So it's 877 and --

5 MS. WIGMORE: And 878.

6 THE COURT: -- 878.

7 MS. WIGMORE: And to the extent there's a
8 hearsay objection, these are statements made by a
9 company officer in the context of a company-sponsored
10 presentation.

11 MS. VERRECCHIO: Your Honor, the problem
12 with the transcript document is that we don't know
13 whether it's authentic or accurate. Having read the
14 transcript, I did notice that there were multiple places
15 that there are typos or indications that the testimony
16 was not clear and so could not be accurately recorded.

17 So we have a problem with the transcript
18 itself. It's not something that was prepared by
19 Centocor or a Centocor document. We would be willing to
20 withdraw the objections to the presentation, which is
21 878, but not to the transcript, 877.

22 THE COURT: The transcript released -- was
23 released for the market to rely on?

24 MS. WIGMORE: That is my understanding.

25 MS. VERRECCHIO: But there's been no witness

1 that has testified to that.

2 THE COURT: I'm going to overrule those
3 objections. 877 and 878 are admitted.

4 MS. WIGMORE: And then just one other issue,
5 Your Honor. We had talked earlier about lab notebooks,
6 and you had admitted the exhibit -- the laboratory
7 notebook of Susan Tam who performed infringement testing
8 for Centocor.

9 It's not on our current list that we
10 provided, Your Honor, but we have on our exhibit list
11 the lab notebook of Dr. Randall Kincaid who performed
12 similar testing. He actually performed invalidity
13 testing for Abbott. And our position is that if the Tam
14 notebook is pre-admitted, then the Kincaid notebook
15 should also be pre-admitted.

16 MR. PEARSON: Your Honor, I would submit --
17 actually, I'm not sure which exhibit we're talking about
18 that's the notebook.

19 MS. WIGMORE: 285 is the report, and it's an
20 exhibit to that report.

21 MR. PEARSON: So if I understand correctly,
22 we have an exhibit that has -- admittedly has hearsay
23 because it's his report, and I understand that they took
24 that exhibit off their list.

25 MS. WIGMORE: That's correct, Your Honor.

1 I'm asking that it be added, and not the whole report
2 but just the laboratory notebook which would be -- would
3 make a separate exhibit.

4 THE COURT: The notebook is where, a copy of
5 it is where?

6 MS. WIGMORE: We actually don't have that
7 here today. I apologize, Your Honor. This is a new
8 development based on our discussions this morning.

9 MR. PEARSON: And I don't have it actually
10 here. I actually don't recall whose notebook it is.
11 There are multiple employees at the company that did the
12 testing.

13 We submitted a notebook where the declarant,
14 the expected witness is the person who wrote the
15 notebook. I don't have the notebook here to actually
16 determine that myself.

17 THE COURT: And you're not going to bring
18 the person that did the test to trial?

19 MS. WIGMORE: That's correct. He was
20 deposed, and the defendants have made ample deposition
21 designations, I believe, about the notebook as well as
22 other things.

23 MR. PEARSON: I don't think that's correct
24 that it's about the notebook. And, in fact, I don't
25 think the notebook was -- the notebook that we're

1 talking about I don't think was an exhibit at the
2 deposition.

3 MS. WIGMORE: A copy of it was.

4 THE COURT: Why don't you send me a copy of
5 the deposition designations that you want to admit along
6 with the notebook?

7 MR. PEARSON: I actually -- my
8 understanding, Your Honor, is that Abbott does not have
9 deposition designations for this person either.

10 MS. WIGMORE: That's correct, we did not.

11 MR. PEARSON: They've withdrawn those
12 deposition designations.

13 MS. WIGMORE: We did, and this is a new
14 issue that arose based on our discussions with Dr. Tam,
15 but we would like to pursue the admission of this
16 particular lab notebook in light of the admission of the
17 Tam notebook, and we are willing to provide Your Honor
18 with a copy of it and any relevant deposition testimony
19 to the extent that would be helpful.

20 MR. PEARSON: And, Your Honor, it's
21 difficult for me to respond --

22 THE COURT: Well, hold on a second, okay?
23 We're not going to do this back and forth, okay?

24 I've already asked her for the deposition
25 designations and the lab notebook. I'll -- I'll rule on

1 it, you know, consistent with what I've ruled on already
2 today, okay? That's -- I mean, we pre-admitted a lot of
3 things without sponsored witnesses. Admittedly, the lab
4 notebook that I've admitted for Centocor was done with
5 the representation from counsel that the person that
6 performed the test is going to be here to testify.

7 I'll take a look at this lab notebook, the
8 deposition designations, and see if the exhibit is
9 admissible. If it is, I'll let it in. If it's not, I
10 won't.

11 MS. WIGMORE: And that's all that we have,
12 Your Honor.

13 I'm sorry, one additional thing. We have
14 not yet handed up the revised list of pre-admitted
15 exhibits, but we can provide Your Honor with the version
16 of all those that we wish to pre-admit are circled, and
17 we'll provide you with a more formal list after we
18 conclude the hearing.

19 THE COURT: Well, has the plaintiff's team
20 had sufficient opportunity to review the list that was
21 provided that included both non-objectionable exhibits
22 as well as those to which you had lodged objections?

23 MR. MASLOWSKI: Your Honor, I think they're
24 actually going to hand you up a copy of the list that
25 we've been working from, so I think we are okay with the

1 exhibit, but we will double check just to be sure.

2 THE COURT: Well, those that are included on
3 the list to which y'all hadn't voiced an objection up
4 until now, I'm going to admit those, and I'll rely on
5 counsel to put together a -- a list of exhibits that are
6 pre-admitted as having not been objected to and those
7 that are pre-admitted over the objections, okay?

8 MS. WIGMORE: Thank you.

9 THE COURT: Can y'all get that to me by
10 Wednesday or so of next week?

11 MS. WIGMORE: Sure.

12 THE COURT: I've carried some. I'll have
13 your rulings on those that I've carried before next
14 Wednesday or, I guess, close of business Tuesday, and
15 then if y'all can put something together for me that
16 memorializes what we've done here today, then I'll have
17 to go ahead and get that issued before you roll out on
18 the following week.

19 MR. MASLOWSKI: That sounds fine.

20 THE COURT: Okay. Where are you on your
21 deposition cuts?

22 MR. MASLOWSKI: Your Honor, my understanding
23 is Abbott has objections to our -- a few of our
24 designations, and they have objections to some of our
25 counter designations, and I believe we have a few to

1 their designations. We have --

2 THE COURT: Okay. All right. Y'all need --
3 have y'all submitted all of your excerpts and a list of
4 what your objections are? I've got notebooks with
5 deposition cuts in them, but those have been marked and
6 everything. I'm not going to go through and read
7 depositions here.

8 MR. MASLOWSKI: Right. Yes, I believe we
9 have submitted everything. There was some agreements
10 this morning, I believe.

11 MS. WIGMORE: Yeah, I think we've worked out
12 a couple of issues so we can provide an update to Your
13 Honor.

14 MR. MASLOWSKI: Right.

15 THE COURT: Why don't y'all send me a letter
16 so I have a copy of the letter in front of me?

17 MS. WIGMORE: Sure. And then there are four
18 of our designations that are witnesses that Centocor has
19 indicated that will appear live, so we're happy to defer
20 any discussions of those objections if the witness
21 appears live.

22 THE COURT: Okay. Well, send me a summary
23 of what you've agreed to and what's --

24 MS. WIGMORE: We do -- I'm sorry.

25 THE COURT: Well, just tell me what's still

1 at issue in the deposition, and I'll read them.

2 MS. WIGMORE: The process is still in
3 dispute, I believe. We have taken the position that
4 given the disparity between the length of the
5 designations, that the way it should be handled is that
6 one side plays its affirmative designations, the other
7 side, to the extent they have counters, would
8 immediately play those, but they should not be combined
9 in one presentation because then we have examples of
10 where the counters will completely outweigh in terms of
11 time the discreet portions of affirmative designations.

12 So that's the process we've suggested. We
13 have agreed for completeness or context purposes to add
14 certain portions and so that things don't have to be
15 replayed for context. But we would like for our
16 designations to be played separately from their counters
17 with those exceptions.

18 MR. MASLOWSKI: And, Your Honor, I don't
19 believe we have total agreement on the context issue.
20 It's Centocor's position that all the designations
21 should just be read from start to finish. We can
22 represent to the jury beforehand that there are
23 designated portions from both parties you're going to
24 hear from the witness. Play the entire videotape.

25 Otherwise, as Ms. Wigmore indicated, there

1 are issues with going back and having to play the same
2 portions to give counters context. Otherwise, there's
3 going to be random questions that show up without any
4 context, and it's going to be pretty confusing to the
5 jury.

6 MS. WIGMORE: And we've actually agreed in
7 those situations to play their counters, but just to
8 give an example of the concern we have, just taking a
9 couple examples, we have a designation of 37 seconds for
10 a particular portion of Bazemore's testimony. Their
11 counters are four minutes and 52 seconds. Similarly,
12 for Mr. Dow, there's one portion we've designated that's
13 19 seconds. Their counters are four minutes and five
14 seconds. For Dr. Shealy, we have a designation of one
15 portion that's one hour -- one minute -- one -- one
16 minute and 10 seconds, and their counters are 10 minutes
17 and 20 seconds. So there's a real issue of --

18 THE COURT: Okay. Well, what I'm going to
19 do, ordinarily, you play the deposition straight
20 through, counters and -- the regular initial
21 designations and counters.

22 In light of what you told me about the
23 length of the counters, I assume what your concern is
24 that they're trying to bury your important stuff with --
25 and bracket it with stuff that you don't feel is very

1 important. I'll look at the designations and see if
2 there's over-designations. If I want to deviate from
3 the rule, then I'll -- I'll do it, okay?

4 MS. WIGMORE: Okay. Thank you.

5 THE COURT: But what I need, though, I
6 assume I have it here, is that something that shows what
7 you've designated versus what they've designated, okay?

8 MS. WIGMORE: You have color-coated
9 versions.

10 THE COURT: Good.

11 MS. WIGMORE: And we'll let you know of
12 additional objections or counters that have been
13 withdrawn.

14 THE COURT: Okay. Okay.

15 MR. MASLOWSKI: Your Honor, would it be
16 helpful by, say, Monday midday we just send you a letter
17 that identifies these are the only issues we want ruled
18 on?

19 THE COURT: Yes.

20 MR. MASLOWSKI: Okay. We will come up with
21 a joint letter and submit it to you.

22 THE COURT: That will help me a great deal
23 actually.

24 MR. MASLOWSKI: Okay.

25 THE COURT: Okay. And I'll -- it's not a

1 warranty that I'll get it to you by -- your rulings by
2 Wednesday, but I'll get it to you -- you know, certainly
3 by the end of next week, you'll have all of the rulings
4 that you need to roll out the following week.

5 Okay. Y'all are starting the 22nd, right?

6 MR. MASLOWSKI: That's correct.

7 THE COURT: Okay. All right. Well, that
8 will be plenty of time to make whatever cuts you need to
9 make before you start.

10 Anything else we can do here today? I've
11 carried some issues, and I've got the deposition cuts,
12 but from the plaintiff?

13 MR. SAYLES: Not from the plaintiff, Your
14 Honor. Thank you.

15 MR. BECK: Judge, we have a couple of issues
16 we just need some guidance on.

17 One, there's an issue with respect to
18 exchange of exhibits and demonstratives, and I think
19 Mr. Sayles and I have worked that out, and we don't need
20 to bother the Court with that, but I know that was, I
21 think, on the agenda, and I just wanted to let the Court
22 know that we think we've worked that out.

23 Also, there's an issue with respect to how
24 we should approach Judge Ward with respect to an issue.
25 As the Court has heard this morning, there's already --

1 and both -- both of these parties have had litigation
2 and a lot of litigation, and there may be some documents
3 that -- and testimony for that matter that might be --
4 either party may try to get in with respect to this
5 other litigation, and I don't know if the Court -- I
6 guess what I'm seeking is should we just raise that with
7 Judge Ward on the first day of trial, or should Your
8 Honor deal with that issue?

9 THE COURT: Well, what I can do is this,
10 I'll give you the knowns, what I -- or at least what I
11 expect he'll ask you to do, and that is with testimony
12 and things that are given in prior litigation, he's
13 going to, I think, require you to refer to it as prior
14 testimony of a witness or a party or something and not
15 refer to the fact that it was prior testimony given in a
16 separate proceeding. Okay. You see the distinction?

17 MR. BECK: Yes, sir.

18 THE COURT: Just say in prior sworn
19 testimony, you've said this or you've previously given a
20 witness statement that says this and not allude to the
21 fact -- if something comes up and you've -- you find
22 yourself in a position where you need to offer a
23 document that has -- you know, that's in another
24 proceeding or a transcript from another proceeding, to
25 the extent it can be redacted, I think he's going to

1 want it redacted, but to the extent it's not, I'd
2 encourage you to approach the bench first before you --
3 certainly before you blow it up on a projector in front
4 of the jury, okay?

5 MR. BECK: Okay.

6 THE COURT: That'd be how I would do it, and
7 I'd do it on a -- you know, I hate to do it piecemeal,
8 but I think that that's about the only way to handle it
9 on an exhibit-by-exhibit basis.

10 MR. BECK: Your Honor, another issue has to
11 do with one of their witnesses, a Mr. Gerald Murphy, and
12 the parties have done a good job, frankly, of working
13 together to pare down the witness list.

14 My understanding is they're going to be
15 calling a Mr. Murphy as a witness in the case, as a
16 rebuttal witness, and I understand that he's a patent
17 law expert. And our position is that the issues that he
18 might be testifying to really are not going to be before
19 the jury, acquiescence the Court's already ruled on as a
20 matter of law, and then as far as laches is concerned or
21 any of the other defenses, that's really going to come
22 up later as opposed to during the case we're going to be
23 trying.

24 So I guess my question is, should we just
25 raise that with Judge Ward, as well, and just alert

1 it -- alert him to it on the day of trial?

2 THE COURT: Well, what's he going to testify
3 about that the jury's going to be addressing?

4 MR. MASLOWSKI: He's going to testify about
5 factual information related to prosecution history in
6 rebuttal. He's on our rebuttal list.

7 THE COURT: Okay. Well, is it going to
8 go -- it's going to go to laches or anything --

9 MR. MASLOWSKI: It will not go to -- to the
10 inequitable -- or the equitable issues.

11 THE COURT: Well, is there a motion in
12 limine that's been granted related to equitable issues?

13 MR. BECK: Yeah -- well, the Judge has
14 separated it.

15 THE COURT: I mean, that's -- I assumed he
16 had.

17 MR. BECK: He said that will be dealt with
18 later.

19 THE COURT: Well, what I would suggest is --
20 I don't want to -- I don't have context for what he's
21 going to try to testify about here today. If you've got
22 some -- something in mind that you think he's going to
23 do that would either run afoul of an order in limine or
24 his bifurcation ruling, I'll -- go ahead and file a
25 motion in limine on that point and allow them the

1 opportunity to respond and, you know, at least flesh out
2 what the issue is.

3 He may rule on that either during the trial
4 or -- or before the trial, or he may refer it to me to
5 rule on. That's -- but I hadn't been asked to do -- to
6 rule on those issues at this time, so --

7 MR. BECK: And the last -- Thank you, Your
8 Honor. And the last issue really has to do with the
9 charge because there have been claims that have been
10 dropped and so on, and I'm sure they're going to want to
11 make some changes in their proposed jury questions and
12 instructions, and I know we're going to do that, and
13 just to refresh my recollection, does Judge Ward
14 typically have a charge conference at some point so that
15 the parties can discuss these various issues with the
16 Court?

17 THE COURT: He will. It's a pretty fluid
18 process depending on what the claims -- I mean, what
19 claims and defenses are really pressed in front of the
20 jury. Those often diverge from what's in -- what all is
21 in the pretrial order, but toward -- I would suspect
22 that toward the end of the plaintiff's case-in-chief or
23 some time between the beginning and the middle portion
24 of your case-in-chief, he will have his briefing
25 attorneys provide you with a draft charge or he may have

1 me work with you-all on that draft charge that I'll
2 furnish to you or that his clerks will furnish to you,
3 and then y'all have a chance to look at it. He'll have
4 an informal charge conference after hours or before
5 hours one day and get your main areas of heartburn, as
6 he calls it.

7 MR. BECK: Okay.

8 THE COURT: He and staff will then confer
9 about those, make an updated change to the charge, and
10 supply you with that. That will be most likely the
11 charge to which you need to be prepared to make your
12 formal objections on the record, but you'll have at
13 least two drafts before you have to make your formal
14 objections, and those drafts will track generally what
15 is going on in front of the jury, the questions he
16 decides to submit to the jury, okay?

17 MR. BECK: Okay. Thank you, Your Honor.

18 THE COURT: And then, you know, obviously --
19 you know, probably after -- after the evidence is closed
20 before he brings the jury back for argument, he'll
21 reserve a half-hour or an hour on the record to allow
22 you to present formal objections and make your final
23 motions for judgment as a matter of law, all right?

24 MR. BECK: Yes, sir.

25 THE COURT: Anything else?

1 MR. SAYLES: Judge, the only thing I would
2 ask is housekeeping, and it's definitely housekeeping.

3 Would you like us to remove any of the
4 notebooks or leave them with you for the time being
5 until, say, Wednesday or so?

6 THE COURT: I need them until Wednesday,
7 okay?

8 MR. SAYLES: Yes.

9 THE COURT: And then I may ask you to come
10 get them after that, okay?

11 MR. SAYLES: All right. Yes, sir. Yes,
12 sir.

13 THE COURT: Appreciate the offer.

14 MR. SAYLES: Yes, sir.

15 THE COURT: Thank y'all.

16 MR. SAYLES: Thank you, Your Honor.

17 MR. BECK: Thank you, Your Honor.

18 THE COURT: Have a good weekend.

19 COURT SECURITY OFFICER: All rise.

20 (Hearing concluded.)

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1 CERTIFICATION

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3 I HEREBY CERTIFY that the foregoing is a
4 true and correct transcript from the stenographic notes
5 of the proceedings in the above-entitled matter to the
6 best of my ability.

7

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9 SHELLY HOLMES Date
10 Deputy Official Reporter
State of Texas No.: 7804
11 Expiration Date: 12/31/10

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